Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

79-1748

GENERAL COMMITTEE OF ADJUSTMENT, UNITED TRANSPORTATION UNION E., BURLINGTON NORTHERN INC., GREAT NORTHERN SEGMENT,

Petitioner,

vs.

UNITED STATES OF AMERICA and BURLINGTON NORTHERN INC.,

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PATRICK J. FOLEY
NORMAN PERL
RICHARD G. HUNEGS
565 Pillsbury Building
608 Second Avenue South
Minneapolis, Minnesota 55402
(612) 339-4511
Counsel for Petitioner

1980—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
United States Not a Party	4
Statutory Provisions Involved	4
Statement of Facts	8
Argument:	
I. THE PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION DEMONSTRATE THAT THE EMPLOYEES WHOSE CLAIMS ARE HERE INVOLVED ARE PROTECTED BY THE LAWS OF THE UNITED STATES.	13
A. Proceedings in th United States.	13
B. The Merger Procedures in Canada Demonstrate that Employee Protection was to be Accorded by the Laws of the United States.	15
II. ADMINSTRATIVE AND JUDICIAL DECISIONS CLEARLY EXTEND WAGE GUARANTEES TO THESE CANADIAN EMPLOYEES OF BURLINGTON NORTHERN.	18
III. THIS COURT SHOULD VOID THE BN-BLE AWARD INVOLVING THE MERITS OF THE CLAIMS WHICH THE UTU SEEKS TO HAVE ARBITRATED.	23
Conclusion	26

APPENDIX INDEX

Appendix A. Slip Opinion, March 19, 1980. General Committee of Adjustment v. Burlington Northern Inc. and Brotherhood of Locomotive Engineers, 8th Circuit A-1
Appendix B. General Committee of Adjustment v. Burlington Northern Inc. and Brotherhood of Locomotive Engineers, 8th Cir., 563 F.2d 1279 (1977) . B-1

TABLE OF AUTHORITIES

Cases:

Canadian Packers Ltd. v. Atchison, T.&S.F. Ry. Co., 385 U.S. 182 (1960) 18, 19, 20
Commonwealth of Pennsylvania v. ICC, CADC, 561 F.2d 278 (1977) 19, 21
Foley Bros. v. Filardo, 336 U.S. 281 (1949) 18
General Committee of Adjustment v. Burlington Northern Inc, 8th Cir., 563 F.2d 1279 (1977)... 2, 9
Great Northern Pacific v. Burlington Lines, Inc., F.D. 21478, 331 ICC 228 (1967) 13, 14
McElroy v. Terminal R. R. Assn., 7th Cir., 392 F.2d 966 (1968), *cert. den.* 393 U.S. 1015 25
Osborn v. Ozlin, 310 U.S. 53 (1940) 18
Reece v. State of Georgia, 350 U.S. 85, 87 (1955) ... 12
Schoenbaum v. Firstbrook, 2nd Cir., 405 F.2d 200 (1968); *cert. den.*, 395 U.S. 906 22
United States v. ICC, 396 U.S. 491 (1970) 22

IN THE

Supreme Court of the United States

October Term, 1979

GENERAL COMMITTEE OF ADJUSTMENT, UNITED TRANSPORTATION UNION E., BURLINGTON NORTHERN INC., GREAT NORTHERN SEGMENT,

Petitioner,

vs.

UNITED STATES OF AMERICA and BURLINGTON NORTHERN INC.,

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner General Committee of Adjustment, United Transportation Union E., Burlington Northern Inc., Great Northern Segment prays that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered in these proceedings on March 19, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals, as yet unreported, was issued on March 19, 1980 and appears at Appendix A, *infra,* pages A-1 - A-7.

The earlier opinion of the United States Court of Appeals, reported *sub. nom. General Committee of Adjustment v. Burlington Northern Inc.*, Eighth Circuit, 563 F. 2d 1279 (1977), is reproduced and published as Appendix B, *infra,* pages B-1 - B-16.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The decision in the Court of Appeals for the Eighth Circuit was filed on March 19, 1980. An order for a stay of mandate was filed by that Court on April 15, 1980. This Petition for a Writ of Certiorari was filed within thirty (30) days from the date aforesaid.

QUESTIONS PRESENTED

Petitioner is a labor organization designated as a collective bargaining representative of certain employees of respondent Burlington Northern Inc. Certain members of petitioner are the claimants herein and hold seniority in both the United States and Canada as employees of the respondent railroad. They performed work in Canada and sought an adjustment of claims involved in that work pursuant to a merger protective agreement entered into and enforced by the Interstate Commerce Commission order approving the merger of the Burlington Northern Inc. When petitioner UTU sought to process the claims, the

respondent railroad and the competing labor organization, respondent Brotherhood of Locomotive Engineers, established an arbitration board and determined the claims.

The Court of Appeals has rendered a decision in this matter on important questions regarding the Interstate Commerce Act and the Railway Labor Act; and these issues should be settled by this Court. This Court has never determined any one of these issues; and petitioner submits the following questions as bases for the issuance by this Court of a Writ of Certiorari to the Court of Appeals for the Eighth Circuit:

1. Whether the Interstate Commerce Act applies protection to railroad employees of a United States railroad merging pursuant to the Interstate Commerce Act for work performed by the employees while in Canada.

2. Whether the Interstate Commerce Act and the Railway Labor Act afford remedies in the United States to the petitioner, the designated grievance representative of the claimants, for claims arising out of a merger protective agreement approved by the Interstate Commerce Commission in its order authorizing the merger of the Burlington Northern Inc. when the claims arise under the merger protective agreement from work by the claimants while working in Canada although the claimants hold seniority in both Canada and the United States.

3. Whether the Railway Labor Act empowers the petitioner, the designated grievance representative, to establish a public law board to determine claims made by the petitioner for its union members who are on a seniority roster that includes both United States and Canadian areas and perform work giving rise to the claim while in Canada.

4. Whether the Raiway Labor Act bars these two respondents, a railroad employer and a competing labor organization, from establishing an arbitration panel to determine the merits of claims of these claimants who have designated this petitioner to process those grievances.

5. Whether the Court of Appeals erred in ruling that Canadian Courts had exclusive jurisdiction to vitiate an arbitration decision based upon the Interstate Commerce Act of the United States although it was obvious that the railroad employees involved in the arbitration had never designated anyone to represent them in that arbitration proceeding but had manifestly designated this petitioner as the grievance representative under the Railway Labor Act.

UNITED STATES NOT A PARTY

The Complaint in the United States District Court named the United States of America as a defendant by reason of 28 United States Code 1336 and 2321. The United States filed a motion of dismissal against it as only a statutorily nominal party and that motion was granted. The United States has not been a party since that dismissal.

STATUTORY PROVISIONS INVOLVED

The Interstate Commerce Act, Title 49, Section 1 et seq., provides in part as follows:

> Section 5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof,

into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership * * *.

Section 5(2)(f) provides:

As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fail and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 565 of Title 45. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The Railway Labor Act, Title 45, United States Code, Section 151 et seq., provides in Section 2 as follows:

> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.
>
> Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier. * * *
>
> Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the

time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

The Canadian Labour Code provides in part as follows:

101(1) * * * 'parties' means

(a) in relation to the entering into, renewing or revising of a collective agreement and in relation to a dispute, the employer and the bargaining agent that acts on behalf of his employees,

(b) in relation to a different relating to the interpretation, application, administration or alleged violation of a collective agreement, the employer and the bargaining agent, and

(c) in relation to a complaint to the Board under this Party, the complainant and any person or organization against whom or which the complaint is made.

158(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for hearing and determination.

STATEMENT OF FACTS

The petitioner is the General Committee of Adjustment, United Transportation E., Burlington Northern Inc., great Northern Segment. It is the collective bargaining representative, under the Railway Labor Act, for Burlington Northern employees working as firemen, switchmen, brakemen, and conductors.

The respondent rairoad is Burlington Northern Inc., a railway formed from the predecessor Great Northern Railway Company, Northern Pacific Railway Company, Pacific Coast R. R. Co., and the Chicago, Burlington and Quincy Railway Company pursuant to an order of the Interstate Commerce Commission, Finance Docket No. 21478, December 15, 1967, 331 ICC 228.

Respondent Brotherhood of Locomotive Engineers, an intervenor in this matter, is the collective bargaining representative for Burlington Northern employees working in the craft of locomotive engineers.

In the United States District Court, this petitioner, U.T.U., sought an order to enjoin respondents B.N. and B.L.E. from setting up a merger arbitration panel, called a Merger Disputes Board, to determine the merits of certain claims which certain B.N. employees, working as engineers in the craft represented by the B.L.E., submitted to the U.T.U. to process by arbitration. The U.T.U. requested the establishment of a public law board pursuant to the Railway Labor Act, 45 U.S.C. Section 153. The B.N. then submitted the matter to the B.N.-B.L.E. disputes committee established by the Merger Protective Agreement entered into pursuant to the Interstate Commerce Act, Title 45, United States Code, Section 5(2)f.

The United States District Court ruled that the public law board did not have jurisdiction to determine claims when the claimants were working as engineers and their claim representative was the U.T.U. Appendix in 76-1910, page 235, 240.

While the matter was pending before the Court of Appeals, petitioner U.T.U. filed a motion for an expedited hearing and injunction pending completion of appeal. That motion was designed to bar the B.N. and B.L.E. from determining the merits of the claims which were the subject matter of the U.T.U.'s efforts to establish a public law board with the B.N. The Court of Appeals denied that motion.

The Court of Appeals on October 19, 1977, ruled that the petitioner UTU-E does have the right to represent its members who while working as engineers developed claims under the Burlington Northern-Brotherhood of Locomotive Engineer Merger Protective Agreement. *General Committee of Adjustment v. Burlington Northern Inc.*, 8th Cir., 563 F.2d 1279, 1285 (1977). The Court, however, remanded the matter because the B.N. had contended that these particular claims were not subject to a public law board under the Railway Labor Act because that Act does not have extraterritorial application to Canadian citizens employed in Canada. The Court remanded the matter for determination as to whether the work had been performed exclusively in Canada and that if so, "* * *then the trial court must determine whether there was a long standing custom and practice by the U.T.U.-E. and the B.N.I. to submit such disputes to a public law board." The Court further directed the District Court to determine whether a public lawboard could have jurisdiction conferred by custom and practice.

On remand, the District Court referred the matter to the United Staes Magistrate for consideration. The Magistrate prepared a proposed order for the Court; and petitioner U.T.U. filed detailed exceptions and objections to the Magistrate's memorandum. Further hearings were held before the United States District Court, and there was then entered record item 13, docket entry II-21, Findings of Fact, Conclusions of Law and Order for Judgment.

The District Court pointed out that the claimants involved were engineers working in Vancouver, British Columbia, at all times material to their claims. The Court found in Finding of Fact No. 2:

> The claims arose from the imposition of an agreed-to transition factor which in effect reduced the merger protective guarantees under the BN-BLE Merger Protective Agreement, providing for guaranteed compensation as a protective condition of the Burlington Northern merger. Imposition of the transition factor was the result of the reduction of the work week from six to five days as made applicable to them through an amendment to the Canada Labour Code. The claimants have contended that the commensurate reduction of wage guarantees through application of the transition factor was improperly applied to them.

The trial court ruled that there was no long standing custom and practice to submit such disputes to a public law board under the Railway Labor Act and held that the National Railroad adjustment Board would be without jurisdiction to entertain the controversy. Finding of Fact No. 6. The District Court ruled that there is no extra-territorial application of the Railway Labor Act and that therefore that Court had no jurisdiction and that it had

no jurisdiction to void the award of the BN-BLE disputes committee which had been theretofore decided, after the Court had denied the U.T.U.'s motion for injunction pending appeal on the first appeal to this Court.

The BLE-BNI Merger Protective Agreement merger disputes committee in case no. 1-A-E considered the claims of the five engineers who selected this appellant, UTU, not the BLE, to represent them on those claims. The award points out that the employees contended that the Board did not have jurisdiction because the claimants were being represented by the UTU-E . The BNI-BLE merger disputes committee, however, did rule on the merits in interpreting the Merger Protective Agreement, which had been entered into between the parties pursuant to the Interstate Commerce Act and enforced by the Interstate Commerce Commission in its order approving the merger.

The award resulted in a determination that the disputes committee had jurisdiction. The BLE member of the board dissented on the mertis of the award but agreed that the Court had jurisdiction.

The Court of Appeals on March 19, 1980 issued its second opinion in this matter, Appendix A; and it is that decision which we seek to have reviewed by the Supreme Court through a Writ of *Certiorari*. The Court of Appeals repeated its earlier holding on the first opinion that this petitioner's right to submit issues to a public law board does not extend to claims submitted by employees who performed the disputed work exclusively outside the territorial limits of the United States. On the issue left open on the earlier opinion, whether a public law board may have jurisdiction conferred over such claims by custom and practice, it ruled that the claims involved were not inter-

national and that because the issue was unique to Canadian employees working in Canada, the dispute is distinguishable from earlier arbitration awards involving the Burlington Northern. The first opinion, in holding that a public law board does not have jurisdiction over claims submitted by employees performing disputed work exclusively outside the territorial limits of the United States, should be considered by this Court because that does not constitute the law of the case. *Reece v. State of Georgia,* 350 U.S. 85, 87 (1955).

The Court of Appeals ruled further that the precedents between this petitioner and the respondent railroad were distinguishable and therefore did not lend a custom and practice jurisdiction to a public law board.

The Court of Appeals declined to void the arbitration decision of the Merger Disputes Committee established between the respondents, Burlington Northern Inc. and the Brotherhood of Locomotive Engineers, despite the uncontroverted statement that the petitioner United Transportation Union had at all times been the designated grievance representative of the claimants involved herein. The Court of Appeals declined to set aside that decision as an issue for the Canadian courts to determine.

All parties to this litigation have conceded throughout all of the litigation that this petitioner was designated by the claimants involved to handle their grievance, that after the petitioner had requested the establishment of a public law board with the respondent Burlington Northern Inc., the two respondents, Burlington Northern Inc., and Brotherhood of Locomotive Engineers established their own arbitration panel called the Merger Disputes Committeee under the Burlington Northern Inc. - Brother-

hood of Locomotive Engineers Merger Protective Agreement to determine the merits of these claims. That arbitration panel rejected the merits of the claims but held that it had jurisdiction to determine these Canadian claims.

Petitioner United Transportation Union seeks a review of the opinion and decision of the Court of Appeals for the Eighth Circuit to determine primarily whether employees protected by an order of the Interstate Commerce Commission may establish the merits of their claims based on that order through a public law board authorized under the Railway Labor Act. The issues involved herein are novel and have not heretofore been determined by this Court.

ARGUMENT

I.

THE PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION DEMONSTRATE THAT THE EMPLOYEES WHOSE CLAIMS ARE HERE INVOLVED ARE PROTECTED BY THE LAWS OF THE UNITED STATES.

A. Proceedings in the United States.

The various carriers applied to the Interstate Commerce Commission in 1961 for authority to merge pursuant to the Interstate Commerce Act.

The first order of the Interstate Commerce Commission rejected the proposed merger. *Great Northern Pacific and Burlington Lines Inc. - Merger, etc. - Great Northern Railway Company, et al.*, Finance Docket No. 21478, 328 ICC 460, March 31, 1966. In those proceedings, Canadian interests apparently were represented through the counsel appearing on behalf of British Columbia. The

Milwaukee Road opposed the applications because of its disadvantageous position.

The order of approval for the merger was served on December 15, 1967. *Great Northern Pacific and Burlington Lines, Inc., - Merger Etc. - Great Northern Railway Company et al.* Finance Docket No. 21478, 331 ICC 228 (1967).

The order recites that the rail network would consist of 27,000 miles of track through various states and two Canadian provinces. That rail trackage, including Canada, is described as being within those applications before the ICC. 331 ICC at 231-232. The Commission pointed out that since the earlier rejection, British Columbia supported the application, as well as several states.

The Commission gave detailed consideration to employee protection as required by Section 5(f) of the Interstate Commerce Act, Title 49, United States Code, Section 5(2)(f) and concluded that there were merger protection agreements entered into after the first order, with greater employee protection at greater cost to the new company. Page 277. Those agreements provided for attrition protection, monetary benefits, retirement allowances, and protection of earnings. Page 277.

The Commission stated further that "in the interest of uniformity and in view of applicants' willingness to extend attrition conditions to all employees, we require, as a condition of our approval of these transactions, the attrition conditions the same as set forth in the agreements mentioned above, be applied to all affected employees who have not entered into separate agreements." *Ibid* at 278-279. These employees are entitled to protection. The

claimants are members of the UTU and are employees of the Burlington Northern. They work out of Vancouver, British Columbia. Appendix, p. 17. They are protected employees under the Interstate Commerce Act. Appendix, p. 17. These claimants are employed in a broad geographic seniority district which includes parts of the United States and British Columbia. Appendix, p. 86. The resolution of the claims here involved is the interpretation and application of transition factors in the Merger Protection Agreement between the BLE and the BNI.

B. The Merger Procedures in Canada Demonstrate that Employee Protection was to be Accorded by the Laws of the United States.

The procedures involving the Burlington Northern merger as they occurred in Canada demonstrate that it was the intention of all parties and the Canadian authorities that employee protection would be granted under the laws of the United States. Furthermore, as the record before the Court of Appeals here demonstrates, the Canadian Labour Code does not grant this petitioner any remedy under Canadian law. The Court of Appeals, slip opinion p. 6, concluded that the employee protection effort attempted by this petitioner is a matter for the Canadian courts. However, the Canadian Labour Code specifically forecloses any such remedy. The Court of Appeals had the relevant provisions of the Canadian Labour Code. Section 158 provides for arbitration. Section 158(1) provides that an arbitration decision may be referred to the Canada Labour Relations Board by the arbitrator, the arbitration board, the Minister, or any party. Section 107

(1) defines parties as restricted to the collective bargaining representative. This petitioner seeks this protection not as a collective bargaining representative but rather as a grievance representative as designated by the employees pursuant to the Railway Labor Act, Title 45, United States Code, Section 153 Second. There are no Canadian remedies available to this petitioner. The only party that could have sought arbitration in Canada is the respondent BLE, which instead of proceeding pursuant to the Canadian Labour Code proceeded pursuant to the United States Interstate Commerce Act and the United States Railway Labour Act and established an arbitration with the respondent Burlington Northern pursuant to the agreement enforced by the ICC in its order of approval.

The Canadian Senate considered evidence from the standing committee on transport and communications. Appendix, 118. The proceedings on May 20, 1965, pointed out that the merged carriers would involve some 24,000 miles of track in the United States and 130 miles of railway in the province of British Columbia. Appendix, 119. During the hearing on May 20, 1965, remarks by George D. Finlayson, QC. Special Counsel, stated that:

> The only operation is the one that is owned by the Great Northern in British Columbia, and it is going to carry on in the same way it is being carried on now. There is no reason why the employees should be affected in any way. Appendix, 122.

Louis Torinus, General Solicitor of the Great Northern in the United States, described the merger agreement, Article X, which refers to pension benefits. Appendix, 123. He was asked by Senator Croll about the employee working agreements, and Mr. Torinus said:

> Under the merger agreement the new company assumes all the obligations of the constituent companies, which would include any contractual obligation under collective bargaining agreements. Appendix, 124. * * *
>
> Mr. Torinus: In the United States, in the event of a merger, the Interstate Commerce Commission passes upon whether or not the merger is in the public interest, and as a part of its duty, under the Interstate Commerce Act in the United States, it must consider the effect upon employees. It imposes in its orders for approving mergers in the United States certain provisions for the protection of employees. It has quite a long history of merger decisions which impose these conditions.
>
> That matter was considered extensively in the merger proceedings here involved, and the examiner has recommended the imposition of protective conditions for the benefit of employees. These are embodied in the examiner's proposed report and are in accordance with the decisions which the Interstate Commerce Commission has made in earlier merger cases. Appendix, 125.

The Queen's Counsel further described the merger as one which "really involves the companies in the United States but to a certain extent it also affects the operations in Canada." Appendix, 128. Further questioning of the Queen's Counsel by Mr. Deachman pointed out that "perhaps I should know this, but in effect you do not operate as a company in Canada, you operate running rights into Canada at those points, or is that so?" The Queen's counsel answered:

> * * * So far as the Great Northern is concerned, it actually owns 130 miles of line in British Columbia. and it operates there.
>
> Mr. Deachman: It operates not as a Canadian company but as a United States company with ownership of lines in Canada as, for example, does the Canadian National Railways across a section of Maine. Is that not right?
>
> Mr. Torinus: That is substantially correct, yes. Appendix, 131.

II.

ADMINISTRATIVE AND JUDICIAL DECISIONS CLEARLY EXTEND WAGE GUARANTEES TO THESE CANADIAN EMPLOYEES OF BURLINGTON NORTHERN.

The history of the Interstate Commerce Commission, as well as the text of the Act, illustrates that the Commission does have power to protect the earning capacity of employees of a company merged under the authority of the ICC even when those employees perform their work in Canada. State action may have repercussions beyond the state lines without judicial significance if the action be not that which the Constitution forbids. *Osborn v. Ozlin*, 310 U.S. 53, 60 S.Ct. 758, 761 (1940). Congress has the power to extend law to cover work performed in foreign countries. *Foley Brothers v. Filardo*, 336 U.S. 281, 69 S. Ct. 575, 577 (1949).

This Court, in *Canada Packers Ltd. v. Atchison, T. & S.F. Ry. Co.*, 385 U.S. 182, 87 S.Ct. 359 (1966), reviewed the power of the ICC to determine the reasonableness of joint through international freight rate. A shipper had contested the reasonableness of a rate from New Mexico to

Canada. The ICC ordered reparations because the rate was unreasonable. The Court stated:

> The provisions of the Interstate Commerce Act apply not only to transporation within the United States but to transportation from or to any place in the United States to or from a foreign country 'but only insofar as such transportation * * * takes place within the United States.' 24 Stat. 379, as amended, 49 U.S.C. Sect. 1(1). * * * As an original matter might well be considerable merit in this position. But the contrary view of the Commissions is one of long standing, * * * squarely held that where a carrier performing transportation within the United States enters into a joint through internatioal rate covering transportation in the United States and abroad, the Commission does have jurisdiction to determine the reasonableness of the joint through rate and to order the carrier performing the domestic service to pay reparations in the amount by which that rate is unreasonable. 87 S.Ct. at 360.

The Court there stated that the long standing construction of the statute by the ICC and the Supreme Court had not produced any particularly unfortunate consequences and Congress had not changed the rule. The decision is directly on point with the issue before this Court, whether there is a constitutional bar to the ICC's extension of protection to employees whose companies have merged under the laws of the United States.

Canada Packers was followd in *Commonwealth of Pennsylvania v. ICC*, CADC Cir., 561 F.2d 278 (1977). The Court there considered the action of the ICC in prescribing rules requiring the filing of voluntarily estab-

lished joint through rates for international transportation participated in by domestic rail, motor, or water carriers regulated by the ICC and ocean carriers under the Federal Maritime Commission. The Court reviewed the history of the ICC and pointed out that Section One (1) of the Interstate Commerce Act defines the parties subject to regulation. and the section includes carriers transporting passenger or property from or to any place in the United States to or from a foreign country insofar as the transportation occurs within the United States. 49 U.S.C. Section One (1). Section 1(2) of the Act, provides jurisdiction over transportation described in Section One (1). 49 U.S.C. Section 1(2). The early provision of Section One (1) established jurisdiction with the ICC over foreign commerce only to those countries adjacent to the United States. but this was changed in 1920 to establish ICC jurisdiction over transportation from or to any place in the United States to or from a foreign country. The Court pointed out that the ICC declined jurisdiction over certain foreign commerce as a "self-imposed restriction on jurisdiction." 561 F.2d at 286-287. Section 6(12) of the Act provides for the filing of tariffs on joint rates between railroads and other carriers operating between United States ports and a foreign country. 49 U.S.C. Section 6 (12). The Court of Appeals followed the *Canada Packers* case and stated:

> The question in *Canada Packers* was whether the ICC was acting lawfully in going beyond *accepting* the rate tariff for filing and actually engaging in substantive regulation of the level of reasonableness of the *entire* joint rate, including the Canadian portion. For historical reasons, the Court permitted the Com-

> mission to continue its longstanding practice of determining the reasonableness of the entire joint through rate. 561 F.2d at 287.

Commonwealth of Pennsylvania referred to additional sections of the Act as an "explicit conferral of jurisdiction of the ICC to accept for filing joint through rates established by motor and ocean carriers." 561 F.2d at 288.

There is no constitutional bar to protecting persons affected by the laws of the United States even if certain events occur outside of the country.

It must be repeated that the ICC order extended protection to all Burlington Northern employees, not just a portion. The claimants who are affected by the present litigation are protected employees, as conceded by both the BNI and the BLE when they submitted the claims to their own merger disputes committee. Furthermore, these claimants have seniority not only in Canada but in the United States. Appendix, p. 86. It would certainly be beyond the intention of the ICC that the BN could transfer its employees within a seniority district from the continental limits of the United States to Canada and thereby abort some claims. If all employees be within the protection of the ICC order allowing the merger, it must be agreed that these claimants must have an arbitration remedy available to them. If the BNI and the BLE were able, as they did, to attempt a decision on the merits of these claims under the BNI-BLE disputes committee arbitration system, the merits of the claims were determined in accordance with the Merger Protection Agreement entered into only under United States law.

A case closely analogous to this one arose under the

securities laws of the United States. In *Schoenbaum v. Firstbrook*, 2nd Cir., 405 F.2d 200, *cert. den.* 395 U.S. 906, the court asserted extraterritorial jurisdiction under the Securities Exchange Act of the United States.

The Court of Appeals in *Schoenbaum* held that the Court had jurisdiction in the United States over the sales which had occurred in Canada. It stated:

> We believe that Congress intended the Exchange Act to have extraterrritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities. In our view, neither the usual presumption against extraterritorial application of legislation nor the specific language of Section 30(b) show Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States, when extraterritorial application of the Act is necessary to protect American investors. 405 F.2d at 206.

This Court affirmed the District Court's approval of the ICC order granting the merger applications. In *United States v. Interstate Commerce Commission,* 396 U.S. 491, 90 S.Ct. 708 (1970), the Court pointed out that the Great Northern operated 8,200 miles of road in ten states and two Canadian provinces and that the Northern Pacific had 6,200 miles of track in seven states and one Canadian province. 90 S.Ct. at 710. The Court considered the necessary elements of the Interstate Commerce Act, including 49 U.S.C. Section 5(2)(c), which requires the

Commission is determining whether a proposed merger is consistent with the public interest considerations including the effect on public transportation, fixed charges resulting from the transaction, and "the interest of the carrier employees affected." There is, of course, no geographical restrictions in the statute or in the Commission order. This Court's opinion approving the merger has an Appendix A, a map of the new line, which shows that it does go into Canada.

III.

THIS COURT SHOULD VOID THE BN-BLE AWARD INVOLVING THE MERITS OF THE CLAIMS WHICH THE UTU SEEKS TO HAVE ARBITRATED.

Petitioner UTU in the District Court sought to establish a public law board to determine the merits of the claims of the men involved in this case. Respondent BN on August 25, 1975, without the permission of the claimants or their designated grievance representative, petitioner UTU, submitted the claims to the BN-BLE disputes committee established under the merger protection agreement between the BN and BLE. Petitioner asked for injunction against proceeding with the establishment of that disputes committee. Appendix 19-21. Proceedings before that disputes committee were delayed from time to time. During the first appeal of this matter to the Court of Appeals, the UTU filed a motion for an expedited hearing and injunction pending completion of appeal. That motion sought to enjoin the respondents from proceeding with the arbitration before the BN-BLE disputes committee.

The UTU contends that the award should be voided by this Court on the basis of the standing assumptions of all

parties during this litigation. Furthermore, the Railway Labor Act specifically grants to individual claimants the right to designate their grievance representative. Title 45, U.S.C., Section 152 Sixth.

The Court of Appeals held that the UTU may establish the public law board to determine merger related issues arising out of the engineer's craft. Respondents BN and the BLE purported to make those decisions.

The damage done by the respondent railroad and competing union were apparently understood by the Court of Appeals in its first opinion, Appendix B. There the Court stated:

> The issue is an important one not only to the employees of the BNI who are members of the UTU-E but also to the Union itself. An aggrieved employee cannot help but feel that his interests in an arbitration proceeding will be better served if his union representative sits in on the closed door discussions that follow a presentation than if a representative of a union to which he does not belong or to which he has not entrusted the adjustment of his grievance has this privilege.

The Railway Labor Act specifically empowers the claimant to designate his own preference for handling the processing of claims. The Railway Labor Act, 45 U.S.C. 152 Sixth, provides that the carrier in dealing with grievances must confer with the representatives designated by the employees. This was violated by the respondent carrier and union in this case because after the petitioner UTU had requested arbitration, the respondent railroad and respondent BLE, a competing labor organization, set up

their own arbitration system to deprive this petitioner of its right to represent the claimants. This is barred by the Railway Labor Act as interpreted by *McElroy v. Terminal Railroad Association of St. Louis*, 7th Cir., 392 F.2d 966 (1968), *cert. den.*, 393 U.S. 1015 (1968). In *McElroy*. it was held that the Federal Courts have power to enforce the individual employee's rights to select his grievance representative. The respondents in the present case did precisely what is barred by the Railway Labor Act, that is that the respondents established a system which supposedly arbitrated the claims and denied the claims although neither party had been selected or authorized by the individual claimants. This was known to the respondents throughout and never denied. It has been conceded throughout that this petitioner is the designated grievance representative of the claimants involved. Without judicial enforcement of the right to represent these people, this petitioner will be unable to exercise its rights, and the individual claimant's rights, under the Railway Labor Act for arbitration for claims based upon the merger protective agreement required by Section 52F of the Interstate Commerce Act.

The ironic part of this is that the respondent BLE, which is the collective bargaining representative in Canada, did not take the proper remedy to protect these claimants under the Canada Labour Code. Yet, the Court of Appeals here has refused to void the decision of the respondent's arbitration proceeding on the theory that this United States arbitration is a matter for the Canadian Courts. That is a legalistic fiction that operates only to the disadvantage of the claimants who have sought this petitioner to represent them in their grievances.

CONCLUSION

The petitioner urges the Court to grant a Writ of Certiorari to the Court of Appeals to review the decision of March 19, 1980 and protect the right of individual claimants to designate this petitioner to represent them in arbitration on claims whose contractual base in a merger protective agreement entered into pursuant to the United States laws, the Interstate Commerce Act, and the Railway Labor Act, which merger protective agreement anticipated that employees would be working in Canada; and the work giving rise to the claim in this case was performed in Canada. That was clearly intended by all parties and the Interstate Commerce Commission and the Court should review the Court of Appeals decision denying our relief.

Respectfully submitted,

PATRICK J. FOLEY
NORMAN PERL
RICHARD G. HUNEGS
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1458

General Committee of Adjustment, United Transportation Union E, Burlington Northern, Inc., Great Northern Segment,

Appellant,

vs.

Burlington Northern, Inc., Brotherhood of Locomotive Engineers,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Submitted: December 6, 1979

Filed: March 19, 1980

Before HEANEY and HENLEY, Circuit Judges, and SCHATZ, District Judge.*

---

*The Honorable Albert G. Schatz, United States District Court for the District of Nebraska, sitting by designation.

HEANEY, Circuit Judge.

This matter is before the Court for a second time. When it was first here,[1] we made it clear that employees of Burlington Northern, Inc. (BNI), who are members of the United Transportation Union-E (UTU-E) working as engineers in the United States, have a right to have their merger-related disputes[2] decided by a Public Law Board on which the UTU-E is represented. As we there stated:

> The issue is an important one not only to the employees of the BNI who are members of the UTU-E but also to the Union itself. An aggrieved employee cannot help but feel that his interests in an arbitration proceeding will be better served if his union representative sits in on the closed door discussions that follow a presentation than if a representative of a union to which he does not belong or to which he has not entrusted the adjustment of his grievance has this privilege. Yet, the employee's position on the seniority roster may be such that it is important to him to maintain his membership in the UTU-E. Moreover, an employee may have strong personal feelings for wanting to maintain membership in the union of his choice and to have that union process his grievances, including those that may be merger-related.

---

[1]*Gen. Committee of Adjust. v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977).

---

[2]The underlying labor dispute involves the question of whether wage guarantees to engineers employed by Burlington Northern, Inc. (BNI) are to be adjusted downwards as a result of a settlement under the Canadian Labour Code which reduced the work week for railway engineers from six to five days.

> The UTU-E is certain to be affected if it loses the right to sit as a member of arbitration panels adjusting merger-related grievances. Some firemen, who might otherwise choose the UTU-E, will join the BLE [Brotherhood of Locomotive Engineers] simply because they will want the most effective representation possible. The problem is compounded because the line between merger-related grievance and those arising out of collective bargaining agreements is one that cannot always be drawn with certainty.

Gen. Committee of Adjust. v. Burlington Northern, Inc., 563 F.2d 1279, 1284 (8th Cir. 1977).

We noted, however, that there was a conflict in the record as to whether the employees in question worked exclusively in Canada. The BNI asserted that such was the case. The Union took the position that at least one of the employees involved performed some work in Seattle, Washington. *Id.* at 1285-1286.

We also noted that the UTU-E presented evidence that a long-standing custom and practice existed between the UTU-E and the BNI and its predecessors under which the parties agreed that work performed in Canada would be subject to the dispute settlement provisions of the Railway Labor Act. The BNI took a contrary position. *Id.*

We then disposed of the issue raised with respect to work performed exclusively in Canada by holding that the right to have a Public Law Board created "does not extend to claims submitted by employees who perform the disputed work exclusively outside the territorial limits of the United States." *Id.* at 1286. We specifically left open

the question of whether jurisdiction of a Public Law Board over such disputes can be conferred by custom and practice and whether such a custom and practice exists. Finally, we remanded the matter to the district court to determine the quetsions left open and to determine whether the disputed work was performed exclusively in Canada.

On remand, the UTU-E conceded for the first time that the engineers filing the claims are yard engineers working in BNI's Vancouver, British Columbia, yards and are employed exclusively in Canada. It presented evidence, however, that a long-standing custom and practice exists between the UTU-E and BNI to submit merger-related disputes involving employees who work exclusively in Canada to a Public Law Board created pursuant to the Railway Labor Act.

The trial court, relying on our opinion in *United Transp. U. Loc. L. No. 31 v. St. Paul Union Depot Co.*, 434 F.2d 220 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971), held that to establish a long-standing custom and practice, the conduct of the parties must encompass a continuity, interest, purpose and understanding which elevates a course of action to an implied contractual status. We find no error in this holding.

> The trial court also found that the evidence does not support UTU's contention that there has been a long-standing custom and practice to submit such disputes to a Public Law Board under the Railway Labor Act. The awards UTU cites are distinguishable on their facts as (1) involving disputes in connection with employees involving disputes in connection with employees whose runs were international in scope in-

volving a major portion of the route and time on the job within the United States, (2) involving a dispute under a collective bargaining agreement, the resolution of which would be the same in both countries under principles having application to working conditions common to both countries, or (3) involving a dispute where it was specifically agreed to by the parties that the matter should be arbitrated by a Public Law Board.

General Committee of Adjustment, etc. v. United States of America and Burlington Northern, Inc., Civ. 4-75-444, slip op. at 4 (D. Minn., May 17, 1979).

This finding, while open to question, is not clearly erroneous: (1) Fewer than ten disputes involving work performed in Canada have been submitted to Public Law Boards established pursuant to the Railway Labor Act by the UTU-E and the BNI or its predecessors over the last forty years. (2) Many of the disputes involved employees whose runs were international in scope involving a major portion of the route and time on the job within the United States. (3) The remaining disputes involved questions under a collective bargaining agreement, the resolution of which would be the same in the United States and Canada under principles having application to working conditions common to both countries.[3]

Here, since the dispute does not involve employees having runs that are international in scope and the question at issue is unique to Canadian employees working exclu-

[3]The third reason given by the district court for holding that no long-standing custom and practice had been proved was that the parties had specifically agreed to submit the prior matters to a Public Law Board. We give this reason no weight on our affirmance.

sively in Canada, the dispute is distinguishable from those which in the past, have been submitted to Public Law Boards.[4]

There are two additional matters which deserve mention. First, during the course of this protracted litigation, the BNI submitted these disputes to a BNI-BLE (Brotherhood of Locomotive Engineers) merger disputes committee. On November 15, 1977, the committee issued award No. LA-E, which favored the BNI. The UTU-E asked the district court and this Court to set aside that award. The district court declined to do so, stating that the question of whether the committee acted lawfully in rendering the award should be sumitted to the appropriate Canadian authority. We also decline to set it aside believing, as does the district court, that the issue is one for the Canadian courts to determine.[5] We have held that the UTU-E has a right to have merger-related disputes involving work performed in the United States submitted to a Public Law Board on which the UTU-E is represented. It is for the Canadian tribunals to determine whether, under Canadian law, the UTU-E has the right to sit on a panel convened to decide merger-related disputes involv-

[4]In the light of our holding, it is unnecessary for us to decide whether the parties can voluntarily confer jurisdiction on Public Law Boards. We simply note that while the parties have done so on a number of occasions in the past, they have not done so here.

[5]At oral argument, counsel for the BNI stated:

> I submit that the subject matter jurisdiction lies with the Canadian tribunal * * *. The opportunity is there for them and they may well be upheld by the appropriate Canadian tribunal. My point is that we have got to get settled once and for all where they are going to go to and where we are going to look to and what body of law we are going to look at in deciding issues arising in Canada. * * * I think we should have a clear determination from this Court where the parties should go to when you have a Canadian facet of this kind involved in the issues and I submit * * * that it should be in Canada.

ing its members. Our refusal to set aside the BNI-BLE award should be given no weight by Canadian authorities. We simply defer to their judgment.

Second, for the first time in its brief on appeal, the UTU-E raised the doctrine of "International Insignificance." That doctrine would apparently hold that a United States Public Law Board should have jurisdiction over this dispute because the merger was essentially consummated and approved in the United States and because BNI's Canadian operations are insignificant compared to those in the United States. Whatever merit the doctrine may have in other contexts, it is not controlling here. We decided, on the first time around, that a Public Law Board would not have jurisdiction if the work in question was performed exclusively in Canada by Canadian employees unless the parties had conferred such jurisdiction by long-standing custom and practices. That decision was not appealed and is, therefore, the law of the case.

Costs will be taxed to the appellant.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1458

General Committee of Adjustment, United Transportation Union E., Burlington Northern, Inc., Great Northern Segment,

Appellant,

vs.

Burlington Northern, Inc., and Brotherhood of Locomotive Engineers,

Appellees.

Submitted Feb. 18, 1977.
Decided Oct. 19, 1977.

APPENDIX B

* * *

Before CLARK, Associate Justice, Retired,* MATTHES, Senior Circuit Judge, and HEANEY, Circuit Judge.

HEANEY, Circuit Judge.

The United Transportation Union E. (UTU-E) appeals from an order of the United States District Court for the

*TOM C. CLARK, Associate Justice, Retired, now deceased, sat by designation, participated in the conference and agreed to the disposition reflected in this opinion.

District of Minnesota granting a summary judgment in favor of the Burlington Northern, Inc., (BNI) granting the motion of the Brotherhood of Locomotive Engineers (BLE) to dismiss the plaintiff's complaint and denying UTU-E's motion for a summary judgment. The effect of the District Court's orders was to hold that the wage disputes involving locomotive engineers employed by the BNI and arising under the Merger Protective Agreement between the bargaining representative of the locomotive engineers and the BNI were to be determined by a BNI-BLE Disputes Committee rather than a Public Law Board established pursuant to the Railway Labor Act or a UTU-E-BNI Disputes Committee.

The underlying facts are briefly stated. Historically, the railroads have recruited locomotive engineers from the locomotive firemen. As a firemen gains seniority, he is exposed to the skills of an engineer. After a certain period, he is examined on his engineering capabilities. If qualified, he becomes eligible for promotion to engineer while retaining his position as a fireman. He is placed on the engineer seniority roster but also retains his position on the firemean seniority roster. With the fluctuating demand for engineers, the employees low on the engineer seniority list "ebb and flow" between positions as engineer and fireman.

The BLE for many years has been the bargaining representative for the locomotive engineers working on the BNI. Similarly, the UTU-E has been the bargaining representative for the locomotive firemen.

Prior to the merger creating the BNI, the component carriers entered into employee protective and merger

agreements with both the BLE and the predecessor of the UTU-E. These agreements provided for the preservation of employment, the guarantee of monthly earnings and the consolidation of seniority rosters and districts on the merged carriers. Subsequently, the railroads and the unions entered into implementation agreements to effectuate the employee protective and merger agreements.

The Interstate Commerce Commission granted the merger applications creating the BNI. It required that the provisions of the protective agreements be implemented and applied to all employees. The Supreme Court subsequently approved the merger.

This litigation arose when the work week for engineers employed by the BNI in Canada was reduced from six days to five days and the wage guarantees provided to engineers were affected. The engineers affected by the work shrinkage disputed the application of the transition factor used to calculate the wage guarantees. The engineers disputing this transition factor were members of both the UTU-E and the BLE. They asked the UTU-E to process their girevance. The UTU-E undertook the responsibility but was unable to resolve the dispute with the BNI. Thereafter, it asked that a UTU-E-BNI Special Board of Adjustment (SBA No. 793) be convened to determine the merits of the matter. The BNI objected, arguing that the SBA No. 793 lacked jurisdiction to hear the dispute. It agreed, however, to submit the jurisdictional issue to the SBA No. 793. The UTU-E similarly agreed. The issue submitted to the Board was:

> Pursuant to the Interstate Commerce Act, the Railway Labor Act and Special Board of Adjustment

No. 793's Agreement dated May 24, 1972, it is the UTU's position that it may refer, present and receive an award from Board No. 793 on any merger related dispute involving one or more of its member's claims and/or grievances while they are in the category of a locomotive engineer and subject to the BLE merger agreement on the BNI, and based on the so-called third party interest of providing BLE with the right to a written interpretation to Board 793's members.

Is the position of UTU correct in part or whole?

The Special Adjustment Board held:

Taking then as it finds them, the UTU (E) Merger Protective Agreements and the May 24, 1972 Agreement under the authority of which this Board functions, Special Board of Adjustment No. 793 cannot find that its jurisdiction and authority extends to the interpretation and application of the provisions of the BNI-BLE Merger Protective Agreement or implementing agreements entered into between BNI and BLE to engineers who happen to be members of UTU(E). Accordingly, the question at issue here must be answered in the negative.

The UTU-E representative on the Board dissented.

Thereafter, the UTU-E requested the BNI to establish a Public Law Board pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* The BNI rejected the request. It served notice that it was submitting the claims of the engineers to the BNI-BLE Disputes Committee even though the employees had submitted no claims to the BLE.

The UTU-E then brought action in the United States District Court for the District of Minnesota. It sought to enjoin the BNI from proceeding with the submission of the claimants' dispute to the BNI-BLE Disputes Committee and to require the BNI to submit the dispute to a Public Law Board pursuant to the provisions of the Railway Labor Act.

The District Court held:

> The UTU-E's contention that the BN has discriminated against it with respect to grievance representation is without merit. * * * [T]he BN has conceded from the start that the UTU-E has the right to represent these engineers before the BN-BLE Disputes Committee if it so desires. * * * [*McElroy v. Terminal Railroad Association of St. Louis*, 392 F.2d 966 (7th Cir.), *cert. denied*, 393 U.S. 813, 89 S.Ct. 83, 21 L.Ed.2d 89 (1968)] does not require that the BN submit this dispute to a board upon which the UTU-E has representation. * * *
>
> The real issue * * * [is] which board under either the merger agreements or by statute has jurisdiction to consider the claims raised by these Canadian engineers. * * * In reaching a determination of this question, the Court must be mindful that the UTU-E's own Disputes Committee, a duly authorized arbitrator under the BN-UTU-E Merger Protective Agreement, held that the BN-BLE Disputes Committee was the proper forum to determine these issues.
>
> The question as to whether a Public Law Board is the proper forum to determine these issues has been

addressed by the Court of Appeals for the Eighth Circuit. In *Brotherhood of Locomotive Engineers v. North Western Railway Co.*, 314 F.2d 424 (8th Cir. 1963), the Court held the arbitration procedure adopted by the parties pursuant to a merger agreement approved by the ICC took precedence over the arbitration provisions contained in the Railway Labor Act. *Id.*, 314 F.2d at 433. On the basis of this decision it is clear that the plaintiff's request for the establishment of a Public Law Board pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* is without merit. * * The BN-UTU-E's Disputes Committee, Special Board No. 793, has already concluded that the proper forum for the resolution of these claims is the BN-BLE Disputes Committee. Given the limited powers of a court to review an arbitration decision, it is clear that the decision of the BN-UTU-E Disputes Committee is depositive of this litigation.

The Court's role in reviewing an arbitration decision is limited solely to determing whether the decision "draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) * * *.Viewing the decision of Special Board No. 793 in light of this standard, it is clear that its decision must be upheld. The essence of the BN-UTU-E Merger Protective Agreement is that it applies solely to firemen, not to engineers. Therefore, Special Board No. 793 correctly determined that it had no jurisdiction to consider engineers' claims arising out of wage guarantees contained in the BN-BLE Merger Pro-

tective Agreement and that the resolution of such claims resided exclusively in the province of the BN-BLE Disputes Committee.

General Committee of Adjustment, United Transportation Union E., Burlington Northern, Inc., Great Northern Segment v. United States of American and Burlington Northern, Inc., et al, No. Civ. 4-75-444 (Lord, J., Order, July 19, 1976).

[1-3] The UTU-E challenges the trial court's holding on several grounds. It initially contends that the court erred in upholding SBA No. 793's decision on the jurisdictional issue. We find little merit to this contention. Ordinarily, the question of whether an arbitration board has jurisdiction to decide a dispute is to be determined by the courts. *Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487, 491-492, 92 S.Ct. 1710, 32 L.Ed.2d 248 (1972); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *International U., U.A., A. & A. I.W. v. International T. & T.,* 508 F.2d 1309 (8th Cir. 1975). Here, however, the UTU-E consented to submit the jurisdictional issue to the Special Adjustment Board and, thus, is bound by the Board's decision.[1]

---

[1]A strong argument can be made that the Special Adjustment Board incorrectly decided the jurisdictional issue. The decision departs significantly from the long practice of permitting employees to process grievances through the union of their choice and permitting the union selected to have its representative on the arbitration panel. There is no evidence to indicate that the UTU-E intended to give up its rights in this regard. To the contrary, the Merger Protection Agreement between the UTU-E and the BNI provided that the BNI would "take over and assume all contracts, schedules and agreements between (the merging carriers) and the [UTU-E] concerning rates of pay, rules, working conditions and fringe benefits * * *." Nevertheless, our func-

[4] The UTU-E next contends that the trial court gave the decision of Special Adjustment Board No. 793 a broader meaning than the Board intended. The court stated that the Board held that jurisdiction to resolve the type of claim submitted here resided exclusively in "the province of the BN-BLE Disputes Committee." The UTU-E is correct. The Special Adjustment Board No. 793 held only that it did not have jurisdiction to interpret the provisions of the BNI-BLE Merger Protective Agreement. It did not decide whether the dispute could be submitted to a Public Law Board pursuant to the Railway Labor Act. The trial court's holding that it could not, therefore, must be judged wthout reliance on the decision of the Special Adjustment Board.

In *United Transportation U. E. v. Burlington Northern, Inc.*, 470 F.2d 813 (8th Cir. 1972), we were faced with a similar problem. In that case:

> [A] dispute arose concerning the proper interpretation of [the] clause with respect to engineers employed by the railroad in the Spokane Division—the basic question being whether the engineers' or firemen's seniority lists would be used to determine which engineers were entitled to priority. The railroad decided that the firemen's seniority list should be controlling. The BLE protested that this action by the

---

tion is limited solely to determining whether the arbitration decision draws its essence from the collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *International Union, etc. v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974), and we cannot say it did not do so here. Another Special Adjustment Board, Board No. 767, Preston J. Moore, neutral chairman, held that claims similar to those advanced here may be submitted to and decided by Public Law Boards established pursuant to the Railway Labor Act. The matter settled before it was referred to a Public Law Board.

carrier failed to fully comply with the terms of the February 19 agreement. It requested that the dispute be submitted to a Special Adjustment Board. The railroad agreed. There is an unresolved dispute in the record as to whether the UTU was advised of and given an opportunity to participate in the hearing.

On July 7, 1971, Special Board No. 768 entered an award in favor of the BLE deciding, in substance, that the engineers' seniority list would be controlling.

The UTU then commenced this action in District Court contending that the award of the Special Board conflicts with its interpretation of the common language in the February agreements; and that in following the award, the railroad violated its contract with the UTU.

The trial court denied relief on two alternative grounds: (1) that the dispute was a minor one within the exclusive competence of the National Railroad Adjustment Board, and (2) that the dispute is essentially a representational one within the exclusive jurisdiction of the National Mediation Board.

Id. at 815.

The UTU-E appealed. We stated in our opinion:

At oral argument, however, counsel for the unions and the railroad agreed that notwithstanding the decision of [the BNI-BLE] Special Adjustment Board No. 768, the UTU has the statutory right under Section 3, first of the National Railway Labor Act, 45 U.S.C. § 153, first, to submit this dispute to the Na-

> tional Railroad Adjustment Board, that all parties would have a right to participate in the hearing before the Board, and that all will be bound by the results reached notwithstanding the decision ofSpecial Adjustment Board No. 768. We are satisfied that counsel's agreement correctly expresses the law.

Id. at 815-816(footnote omitted).

Subsequent to oral argument, counsel for the UTU-E changed his mind. He advised the Court that he erred in making the above concession. He stated that the merger agreements between BNI and UTU-E, and BNI and BLE provided the exclusive forum for the resolution of the dispute. As his change of position was received after our opinion was written but before it was released, we added the following footnote:

> The merger agreement provides a method under which issues such as this can be resolved, but we do not beleieve that the method is an exclusive one.

Id. at 816 n.1.

We then held that a union has a right to submit merger-related disputes to a Public Law Board. No appeal was taken from the decision of this Court and no petition for rehearing enbanc was filed.[2] We are now confronted with the question as to whether we will adhere to this

[2]Subsequent to our decision, the matter was submitted to a Public Law Board in which the BLE, the UTU-E and BNI participated. The Board accepted jurisdiction of the dispute. It affirmed the award of the Special Board of Adjustment No. 768, stating that the award was "final and binding on the parties therein." It dismissed the petition of the UTU-E without prejudice. The Public Law Board was critical of our holding but *did* decide the merits of the dispute with both unions participating.

holding and permit the UTU-E to sumit this dispute to a Public Law Board and require the BNI to participate in such submission.

[5] Before answering this question, we make clear that all parties agree that in all merger-related disputes, members of the UTU-E working as engineers are entitled to be represented by the UTU-E before a BNI-BLE Special Adjustment Board. Similarly, BLE members working as firemen are entitled to be represented before a UTU-E-BNI Special Adjustment Board by the BLE. *See McElroy v. Terminal Railroad Association of St. Louis,* 392 F.2d 966 (7the Cir.), *cert. denied,* 393 U.S. 1015, 89 S.Ct. 610, 21 L.Ed.2d 559 (1968); *Brotherhood of Locomotive Eng. v. Denver & R. G. W. R. Co.,* 411 F.2d 1115 (10th Cir. 1969). We also make it clear that all parties agree that in disputes arising out of collective bargaining agreements, other than merger protective agreements, an employee not only has a right to be represented by the union of his choice but also has a right to have his union representative sit on the arbitration panel deciding the case. The employee has the right even though the contract being construed was negotiated by a rival union and even though precedents established by the rival union and the railroad are to be followed.

We finally make it clear that we have approved the decision of a UTU-E Special Adjustment Board holding that it does not have jurisdiction to hear merger-related disputes which involve the construction of the collective bargaining agreement between the BNI and the BLE.

[6] The disagreement lies only in whether a locomotive engineer, who is a member of the UTU-E and employed by the BNI, has a right to have the merger-related dis-

pute decided by a Public Law Board on which the UTU-E is represented.

The issue is an important one not only to the employees of the BNI who are members of the UTU-E but also to the Union itself. An aggrieved employee cannot help but feel that his interests in an arbitration proceeding will be better served if his union representative sits in on the closed door discussions that follow a presentation than if a representative of a union to which he does not belong or to which he has not entrusted the adjustment to his grievance has this privilege. Yet, the employee's position on the seniority roster may be such that it is important to him to maintain his membership in the UTU-E. Moreover, an employee may have strong personal feelings for wanting to maintain membership in the union of his choice and to have that union process his grievances, including those that may be merger-related.

The UTU-E is certain to be affected if it loses the right to sit as a member of arbitration panels adjusting merger-related grievances. Some firemen, who might otherwise choose the UTU-E, will join the BLE simply because they will want the most effective representation possible. The problem is compounded because the line between merger-related grievances and those arising out of collective bargaining agreements is one that cannot always be drawn with certainty.

It was to avoid these problems and to accommodate the ebb and flow between firemen and engineers that the Seventh Circuit in *McElroy v. Terminal Railroad Association of St. Louis, supra*, and the Tenth Circuit in *Brotherhood of Locomotive Eng. v. Denver & R. G. W.R. Co.,*

supra, held that members of the Firemen's Union, the predecessor to the UTU-E, could designate that Union to represent them before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while they perform the services of locomotive engineers. We would note that such representation is conceded by all parties to this dispute to include the right to have a Firemen's Union representative serve on the adjustment board. The logic that inspired the holdings in the cited cases is applicable here.

We, thus, find no reason for departing from our decision in *United Transportation U. E. v. Burlington Northern, Inc., supra,* and neither the BNI nor the BLE have advanced any practical reasons for doing so.

The BNI and the BLE argue that this Court's decision in *Brotherhood of Loc. Eng. v. Chicago & North Western Ry. Co.,* 314 F.2d 424 (8th Cir. 1963), precludes our holding that the UTU-E has a statutory right under § 3, first of the National Railway Labor Act, to submit merger-related disputes of their members to the National Railroad Adjustment Board. While this assertion is contrary to the position taken by them when previously before this Court, it deserves an answer.

In the cited case, the Brotherhood of Locomotive Engineers insisted that they had a right to strike over five jobs, which were being abolished pursuant to a merger between the Northwestern and M. & St. L. Railroads and related seniority problems. The merger had been approved by the ICC. We held that § 5 of the Interstate Commerce Act vests in the Commission broad powers to approve, authorize and facilitate mergers; and pursuant to that au-

thority, the ICC had approved a merger protective agreement which included provisions to protect employees and to adjust work realignments. We concluded that the employees did not have a right to strike over merger-related disputes. In the process, we used language which is certainly broad enough to support the appellees' point of view.[3] But we are presented with an entirely different situation. No strike is threatened and everyone agrees that the dispute will be settled by arbitration. The only question is whether the UTU-E can sit on the arbitration board that is convened to decide a claim submitted by a UTU-E member to the UTU-E and by the Union to the BNI. We hold that they have a right to do so. If they are precluded from doing so in a Special Adjustment Board, as they were here, they can process the merger-related grievances of their members through a Public Law Board established pursuant to the Railway Labor Act. *Contra, Clemens v. Central Railroad Company of New Jersey*, 264 F.Supp. 551 (E.D.Pa.1967).

We see no practical problems arising from this opinion. It simply gives the aggrieved engineer or fireman a choice of forums in merger-related disputes. It also assures the employee that a representative of his choice will be permitted to serve on the board deciding the dispute.

---

[3]We believe that the cases afford very substantial support for the view that Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of § 5 (11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law.

Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of § 5 (11).
Brotherhood of Loc. Eng. v. Chicago & North Western Ry. Co., 314 F.2d 424, 431-432 (8th Cir. 1963).

There is one additional issue in this case, however, which prevents us from requiring that this particular dispute be sumitted to a Public Law Board. The BNI alleged in its answer that the trial court was without jurisdiction to order the BNI to join in convening a Public Law Board under the Railway Labor Act inasmuch as that Act does not have extraterritorial applicability to Canadian citizens employed in Canada. It alleged that the claims asserted here were all claims of Canadian citizens employed in Canada. The Union submitted affidavits reciting that a long standing custom and practice existed between the UTU-E, the BNI and its predecessors under which the parties agreed that work performed in Canada would be subject to the disputes settlement provisions of the Railway Labor Act. The affidavit further recited that the BNI had recognized the jurisdiction of the National Railroad Adjustment Board to determine claims involved in incidents arising in Canada. A subsequent affidavit filed by the Union stated that the claims of one of the employees involved work performed in Seattle, Washington. The BNI submitted counter-affidavits stating that the claimants were employed by the BNI at its yard at Vancouver, British Columbia. It submitted the original claims filed by the UTU-E with the BNI in support of tis position.

The issue of the applicability of the Railway Labor Act to Canadian Workers was discussed at trial, but no evidence was taken with respect to the factual issues raised by the conflicting affidavits. No findings were made by the trial court with respect to the issue.

This Court held in *Air Line Stewards, Etc., Ass'n v. Northwest Airlines, Inc.*, 267 F.2d 170 (8th Cir.-, *cert. denied*, 361 U.S. 901, 80 S.Ct. 208, 4 L.Ed. 156 (1959),

that the Railway Labor Act was limited to the continental United States and its territories. *See also Airline Stewards, Etc. v. Trans World Airlines, Inc.*, 273 F.2d 69 (2nd Cir. 1959), *cert. denied*, 362 U.S. 988, 80 S.Ct. 1075, 4 L.Ed. 2d 1021 (1960); *Airline Dispatchers Ass'n v. National Mediation Board*, 89 U.S.App.D.C. 24, 189 F.2d 685, *cert. denied*, 342 U.S. 849, 72 S.Ct. 77, 342 U.S. 849 (1951); *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees Robert W. Blanchette, et al., Trustees of the Property of Penn Central Transportation Company*, Doc.No. CL-21125, National Railroad Adjustment Board Award No. 21413 (February 18, 1977).

[7] In the light of these decisions, an initial determination must be made as to whether the disputed work was performed exclusively in Canada. We cannot make that determination from this record. It must be made by the trial court.

If it is determined that the work was performed exclusively in Canada, then the trial court must determine whether there was a long standing custom and practice by the UTU-E and the BNI to submit such disputes to a Public Law Board. If that question is answered in the affirmative, a decision must be made as to whether jurisdiction can be conferred on a Public Law Board by custom and practice. We defer answering that question until the trial court makes appropriate factual findings and expresses its opinion on the matter.

In summary, we hold that the UTU-E has a right to submit merger-related disputes to a Public Law Board established pursuant to the Railroad Labor Act and has

the right to be represented on the Public Law Board deciding the disputed issues. The disputed issues are to be decided in accordance with interpretations based on the collective bargaining agreement by the bargaining agent of the employees submitting the claims. We further hold, however, that the right to have a public Law Board created does not extend to claim submitted by employees who performed the disputed work exclusively outside the territorial limits of the United States. We leave open the question of whether jurisdiction to decide disputes can be extended to such work by custom and practice. We remand to the District Court for action not inconsistent with this opinion.

Each party to this appeal will bear its own costs.